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DISTRICT OF UTAH  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant/Counterclaim-Plaintiff.

**IBM'S EX PARTE MOTION FOR LEAVE TO  
FILE SUR-REPLY**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

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Pursuant to DUCivR 7-1(b)(3), International Business Machines Corporation (“IBM”) respectfully moves the Court for leave to file a sur-reply memorandum in response to The SCO Group, Inc.’s (“SCO”) Reply Memorandum in Support of Motion for Leave to File Third Amended Complaint, filed on December 29, 2004.

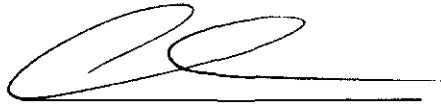
Although we have not yet seen a formal order of reference, we understand that SCO’s motion to amend will be heard by this Court. Assuming that is the case, IBM respectfully requests that the Court allow IBM to submit a sur-reply memorandum to address issues raised by SCO for the first time in its reply brief that are important to the resolution of that motion.

As the Court is aware, a reply memorandum in support of any motion “must be limited to rebuttal of matters raised in the memorandum opposing the motion.” DUCivR 7-1(b)(3) (emphasis added). In its motion, SCO argued that its proposed amendment was timely because it “did not know and could not reasonably have determined” that IBM’s AIX 5L for Power product contains certain UnixWare/SVR4 source code until SCO received various documents from IBM in discovery in April 2004. (SCO Mem. at 15.) Rather than providing all (or any) facts which might support such a contention with its opening memorandum, however, SCO waited until after IBM showed in its opposition memorandum that SCO had — or should have had — such knowledge (which has been publicly available for over three-and-a-half years), only then submitting a declaration from a witness formerly employed at The Santa Cruz Operation, Inc. In the declaration, SCO offers new factual arguments regarding notice, arguments to which IBM necessarily has had no opportunity to respond. (See Reply Mem., Ex. A, 12/29/04 Decl. of Jay F. Petersen.) Because SCO waited until the filing of its reply memorandum to proffer these new factual and other arguments, IBM respectfully requests that it be given leave to file a brief sur-reply to fully address these important issues for the Court.

For the foregoing reasons, IBM respectfully requests leave to file a sur-reply memorandum in response to SCO's Reply Memorandum in Support of Motion for Leave to File Third Amended Complaint.

DATED this 28<sup>th</sup> day of January, 2005.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of January, 2005, a true and correct copy of the foregoing was sent by U.S. Mail, postage prepaid, to the following:

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